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NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>FERNANDO SANCHEZ ROSALES,<br><br>Defendant and Appellant. | C082587<br><br>(Super. Ct. No. 15F80) |

A jury found defendant Fernando Sanchez Rosales guilty of first degree murder (count 1) and burglary (count 2). The jury also found true that the burglary was in the first degree and the dwelling was inhabited at the time of the burglary. The trial court sentenced defendant to 25 years to life in prison for count 1 and the upper term of six years for count 2. The court stayed the sentence for count 2 under Penal Code section 654.[1] On appeal, defendant contends: (1) his murder conviction must be reversed

[1] Undesignated statutory references are to the Penal Code.

because it was based on a felony-murder theory barred by the superior court's ruling on his motion to dismiss other portions of the information under section 995; (2) his convictions were based on insufficient evidence and legally insufficient theories; (3) the trial court failed to instruct on the lesser included offense of voluntary manslaughter; (4) he was shackled in violation of his rights to due process and a fair trial; and (5) his rights to due process and a fair trial were violated by the admission of prejudicial hearsay in the form of receipts. We conclude any error in admitting hearsay evidence was harmless under *People v. Watson* (1956) 46 Cal.2d 818, and we reject the remainder of defendant's contentions on appeal. Accordingly, we affirm the judgment.

## I. BACKGROUND

### *A. Discovery of Artis's Body*

On October 21, 2014, a deputy sheriff was dispatched to do a welfare check at Artis's home in Burney. He found the front door unlocked. After finding an obviously deceased man in the garage, the deputy requested backup. After backup arrived, the two men opened the garage to air out the smell of decomposing flesh, and then inspected the body. It belonged to Artis.

Artis was on his back with his arms straight out to the side and his palms up like someone being crucified. One leg was straight, and the other was folded underneath it. His undershirt and shirt had been pulled up near his armpits and above his shoulders, respectively. Artis's clothing had grass on it.

A large window in the living room and to the right of the front door had been smashed out, and there was a large rock on the floor by the curtains. One table had been flipped over, and there were chess pieces on the ground. No television was in the living room, but there was a cable box and other television equipment. A second table was covered with dust, except for a clean rectangular outline. There was blood splatter leading up to the front door, on the siding of the garage, and what appeared to be drag marks that looked like four bloody fingers on the concrete.

An investigative technician who went to the crime scene to collect evidence the following day found what looked like a broken table leg near the front of the garage and by the decomposition fluid.

A criminalist for the Department of Justice analyzed the DNA found on the rock and concluded defendant could be a major contributor. The chance of this occurring randomly was one in 4.4 sextillion Hispanics. The criminalist could not exclude Artis as a major contributor to the DNA from the bloody table leg.

*B. Autopsy Findings*

A forensic pathologist performed an autopsy on Artis's body. It was badly decomposed. Artis had a one-inch laceration from a blunt force above his left ear. He also had a fracture of his left ulna, the small bone in the forearm just above the wrist. The pathologist opined this injury was likely a defensive wound caused by putting up the hand to ward off an attack. Artis had a large bruise from a blunt force on the undersurface of his scalp from ear to ear across the top of his head. The first eight ribs on the left side of his chest, and the third, fourth and fifth ribs on the right side of his chest were broken. There was also bleeding in the muscles between the ribs. To produce this bleeding takes a force equivalent to being involved in an automobile accident or falling from two or three stories. The pathologist explained it is unusual to fracture the first and second ribs. It takes a great deal of force to do so. Artis had a small amount of blood in the sac that surrounds the heart, which indicates a blunt force to the chest. This injury was consistent with someone stomping him or striking him with an object like a baseball bat. The pathologist testified the cause of Artis's death was that he stopped breathing because of his injuries. The pathologist was not able to estimate how long it took Artis to die, other than to say it could have been a few minutes or up to a few hours.

Artis had a low level of methamphetamine in his system at the time of his death.

*C. Events Leading Up to the Discovery of Artis's Body*

Before his death, Artis had been growing marijuana on his property with Julio and Rodrigo.[2] The three men agreed to split the yield of the plants equally. Around September 2014, they needed more help on the farm. Julio and Rodrigo found someone they called "Flako" to live in the trailer on Artis's property and take care of the plants. "Flako" is defendant's nickname. The men agreed that, in exchange for his help, defendant would get a cut of the plants as well as a white car that Julio had.

On October 8, 2014, at around 1 p.m., a patrol sergeant from the Shasta County Sheriff's Office was dispatched to Artis's house. Artis had blood on his face and reported that he had been punched in the face three times by "Flavos," a Hispanic male who lived in the trailer adjacent to his marijuana garden. Artis said the fight was over "crank," which the sergeant understood to refer to methamphetamine. Artis appeared to be under the influence of something, which the sergeant also assumed was methamphetamine. The sergeant saw about 30 plants in the marijuana garden. There were two notes on the front door. The first read, "Marcos, Flavos is a real dick. . . . Tonight he will die. If you leave him here tonight, don't come back."[3] The second said, "Marcos, if you don't take Flavos, don't come back. Art."

Artis called Rodrigo and asked him to pick up defendant because they had had an argument. Rodrigo later spoke to defendant on the phone. Defendant said he had a problem with Artis and that he had hit him.

A California Highway Patrol officer was dispatched to Artis's home at around 8 p.m. on October 8, 2014. Artis reported his SUV had been stolen sometime between 10

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[2] Rodrigo testified at trial in return for a grant of immunity. Julio was last seen a few days after defendant was arrested.

[3] Rodrigo also goes by the name "Marcos."

a.m. and 3 p.m. by "Flavo," who lived on the property. Artis showed the officer his driver's license.

On October 10, 2014, Artis's neighbor, George, gave him a ride to the store. Artis purchased various items himself before returning home at around 11 a.m. Artis's front window was not broken at this time.

At around 12:15 p.m., the patrol sergeant returned to Artis's home in response to a call about the stolen car. Artis appeared to be "much more clear" and "not nearly as excited" as he had been on October 8. The sergeant left at 12:38 p.m.

Meanwhile, defendant drove to his grandfather's house in Corning in the SUV. Defendant told his grandfather that the man he worked with was crazy and that is why he took his SUV. Defendant's grandfather's wife overheard defendant say he was going to take the SUV back and steal the marijuana. Defendant's grandfather gave him $20 for gasoline.

In post-arrest interviews, defendant admitted that after two days, on October 10, 2014, he returned to look for the marijuana farm. Defendant said the marijuana was already gone by the time he found the farm.

Around this time, defendant returned to his grandfather's house with a computer. Login information indicated it was Artis's computer, and that he had last logged in on October 11, 2014, at 1:36 p.m.[4]

Rodrigo testified that sometime after October 8, 2014, he saw defendant somewhere in Gerber. Defendant was driving Artis's SUV, and he pulled out a machete. A day or two later, Rodrigo gave defendant the keys to the white car to avoid any more problems.

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[4] The defense called an information technology consultant as a witness, and he testified that, on October 11, 2014, the computer was in a different network environment than it previously had been.

On October 13, 2014, defendant was arrested when he tried to sell Artis's SUV for $1,000 without papers. He was in custody in Tehama County jail until October 22, 2014. Attempts to contact the owner of the vehicle were unsuccessful. Artis's wallet, which contained his driver's license, was found inside the SUV. No evidence of marijuana was found in either the white car or the SUV.

On October 21, 2014, another one of Artis's neighbors called George because Artis's dog had been running loose since between October 14 and 16, and Artis was not responding to phone calls. After George went to Artis's house and saw that the front window was broken, he called the police.

On October 31, 2014, defendant's grandfather told officers that defendant had mentioned he had recently sold a television to a friend in Gerber. The next day, law enforcement took the television. George testified that it looked like the television that had been on Artis's table.

## II. DISCUSSION

### *A. Motion to Dismiss*

#### *1. Superior Court Proceedings*

The complaint charged defendant with one count of murder. (§ 187, subd. (a).) After the preliminary hearing, the superior court issued a commitment order holding defendant to answer to the murder charge.[5]

The prosecution subsequently filed an information charging defendant with murder (count 1) and first degree burglary (count 2). The information alleged three special circumstances: (1) Artis was a witness to a crime who was intentionally killed in retaliation for his testimony in a criminal proceeding (§ 190.2, subd. (a)(10)), (2) defendant committed the murder while engaged in the commission of robbery

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[5] The preliminary hearing was conducted before the Honorable Cara L. Beatty.

(§ 190.2, subd. (a)(17)(A)), and (3) defendant committed the murder while engaged in the commission of burglary (§ 190.2, subd. (a)(17)(B)).

Defendant moved under section 995 to dismiss count 2 and the special circumstances allegations on the grounds there was insufficient evidence to support them. As part of this argument, defendant asserted special circumstances do not apply unless there is sufficient evidence to support a holding for first degree murder. In its opposition, as relevant here, the prosecution argued there was sufficient evidence to support first degree murder because the murder was willful, deliberate and premeditated or, alternatively, a felony murder.

Defendant's motion was heard by the Honorable Daniel E. Flynn. The court said: "I have read the moving papers and have read the opposition by the People. It is . . . not a Motion that necessarily is attacking the substantive [section] 187 charge, it is one that is attacking the allegations which were added to the Information and for which there was not a holding order. That would be the residential burglary, Count 2, and the three [section] 190.2[, subdivision ] (a) allegations. Those are the special circumstances.

"And so let me give you a tentative that each of you can work with. With regard to the special circumstances, and this comes from essentially the CALCRIMS, for those which involve a homicide or a murder in the course of some sort of felony, and here the special circumstances are—the first degree burglary and a robbery. The act causing the death and those felonies were part of one continuous transaction. That's a requirement. And that there was a logical connection between the act causing death and the felony [¶] The connection between the fatal act and the felony must involve more than just their occurrence at the same time and place. That comes from CALCRIM.

"With regard to those, the tentative is to grant. First of all, this is not a situation where the Court's analysis is one that essentially is defined [*sic*] supporting facts that support the holding order, it is essentially this Court's analysis of sufficient cause or probable cause, however the People prefer to state that as far as a holding order. But I'm

having a very difficult time within the confines of the transcript finding that logical connection between the act causing death and the felony itself, since we have a circumstantial case with about a 48 hour or more period of time I think where we can logically assume the homicide took place. And there certainly was sufficient cause with regard to the homicide that [defendant] should have been held to answer there.

"But as far as whether or not there, in fact, was a robbery would be dependent upon whether or not force was used in the taking of the property and for the special circumstance connected for that purpose. There is just no way in the facts that I can find that. I think it is probably something that could be argued, but I don't see that.

"As far as the substantive count of the burglary, I am satisfied that the record supports the substantive count. And that would be based on the TV. [¶] . . . [¶] I would find enough for the substantive count, but between various alternatives, as far as whether the burglary to take the TV had a logical connection to the act causing death, whether it happened before, maybe sometime after, there just is not the type of information within the transcript to support that special allegation." The court granted the motion to dismiss with respect to the special circumstances allegations and denied it with respect to the substantive count of burglary.

The prosecutor filed an amended information alleging deliberate and premeditated first degree murder (count 1) and first degree burglary (count 2).

Trial was set before the Honorable Monica Marlow.

At the close of the prosecution's case in chief, the defense moved pursuant to section 1118.1 to dismiss the burglary charge and the allegation of premeditation and deliberation for insufficient evidence. At this point, the prosecution stated it would also be relying on a felony-murder theory in addition to premeditation and deliberation. Defense counsel interposed no objection. The motion was denied, and the jury was instructed on both theories of first degree murder.

*2. Analysis*

Defendant contends his right to due process and a fair trial were violated when the jury was permitted to convict him based on a felony-murder theory that was barred by factual findings made by the superior court in its ruling on the section 995 motion. The People argue this contention is forfeited because defendant did not object to the prosecution relying on the felony-murder theory in the trial court. However, defendant further claims he was denied effective assistance of counsel by his trial counsel's failure to object.

To prevail on his claim of ineffective assistance of counsel, defendant must show: (1) that his counsel's representation was deficient, i.e., that it "fell below an objective standard of reasonableness" and (2) that prejudice resulted, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.) "If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) We conclude defendant has not shown defense counsel was deficient in failing to object to the prosecution's use of a felony-murder theory because the superior court's earlier ruling on the section 995 motion did not bar the use of that theory.

In order to understand the superior court's ruling, and the defendant's claim, we must examine the interplay between felony murder and the felony-murder special circumstance. The felony-murder rule provides that "[a]ll murder . . . that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping [or] train wrecking . . . is murder of the first degree." (§ 189.) The special circumstance set forth in section 190.2, subdivision (a)(17) is similar. (3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment, § 532, pp. 853-854.) It requires, as applicable to this appeal, that the murder was committed while defendant was "engaged in . . . the commission of" robbery or burglary. (§ 190.2, subd. (a)(17)(A) &

(G).) Additionally, "the felony-murder special circumstance requires that the defendant must commit the act resulting in death 'in order to advance an independent felonious purpose.' That means only that he must not perpetrate the underlying felony as 'merely incidental to the murder.' " (*People v. Davis* (1995) 10 Cal.4th 463, 519, fn. 17 (*Davis*); see *People v. Marshall* (1997) 15 Cal.4th 1, 41 ["The robbery-murder special circumstance applies to a murder in the commission of a robbery, not to a robbery committed in the course of a murder"].) The People theorize it was this requirement that drove the superior court to grant the motion to dismiss the special circumstances allegations. In other words, they posit this is the "logical connection" the court thought was lacking.

As defendant notes, however, the superior court made clear it was reading from the CALCRIM jury instructions and bench notes, and we can thus discern from the transcript that it was reviewing the optional language found in the bench notes to CALCRIM No. 540A regarding felony murder: "There must be a logical connection between the cause of death and the _____ <*insert felony or felonies from Pen. Code, § 189*> [or attempted _____ <*insert felony or felonies from Pen. Code, § 189*>]. The connection between the cause of death and the _____ <*insert felony or felonies from Pen. Code, § 189*> [or attempted _____ <*insert felony or felonies from Pen. Code, § 189*>] must involve more than just their occurrence at the same time and place." (Judicial Council of Cal., Crim. Jury Instns. (2018) Bench Notes to CALCRIM No. 540A, pp. 263-264, boldface omitted.) As supporting authority, the bench note cites *People v. Cavitt* (2004) 33 Cal.4th 187 (*Cavitt*) and *People v. Wilkins* (2013) 56 Cal.4th 333 (*Wilkins*). (Judicial Council of Cal., Crim. Jury Instns. (2018) Bench Notes to CALCRIM No. 540A, p. 264.) The People ignore the overlap between these instructions and the specific words used by the superior court, and instead argue a "logical connection" between the robbery or burglary and the murder is not required under the felony-murder rule because " '[u]nder the felony-murder rule, a strict causal or

temporal relationship between the felony and the murder is not required; what is required is proof beyond a reasonable doubt that the felony and murder were part of one continuous transaction.' " (*Wilkins, supra,* at p. 340.)[6] As *Wilkins* explains, some logical connection is still required for felony murder: " 'the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act resulting in death.' (*Cavitt, supra,*[] at p. 193.) The causal relationship is established by a 'logical nexus' between the felony and the homicidal act, and '[t]he temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction.' " (*Id.* at pp. 346-347.)[7]

In contrast, CALCRIM No. 730 regarding the special circumstance of murder in the commission of a felony contains no mention of the need for a "logical connection." It does, however, include the following optional instruction: "In addition, in order for this special circumstance to be true, the People must prove that the defendant intended to commit _____<*insert felony or felonies from Pen. Code, § 190.2*[*, subdivision* ]*(a)(17)*> independent of the killing. If you find that the defendant only intended to commit murder and the commission of _____ <*insert felony or felonies from Pen. Code, § 190.2*[*, subdivision* ]*(a)(17)*> was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved." While the court may have also had this language in mind, it did not state so explicitly. The superior court read from the bench notes to the jury instructions regarding felony

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**6** This is also true of felony-murder special circumstances. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 87.)

**7** *Wilkins* addressed whether a temporal relationship is required. (*Wilkins, supra,* 56 Cal.4th at pp. 346-347.) The People conceded there was "a sufficient [causal] nexus between the burglary and the homicide because the homicide was caused by defendant's act of driving away from the scene of the crime with his truck loaded with stolen items that were not secured." (*Id.* at p. 346.)

murder and appeared to be concerned with a lack of evidence demonstrating the contemporaneousness of the murder and the burglary. Thus, defendant is correct that the special circumstances were dismissed on the basis of an insufficiency that could have also applied to a felony-murder theory of first degree murder. The court did not, however, rule that felony murder could not be asserted. Rather, it stated there was sufficient cause as to the homicide charge. This distinction ultimately renders defendant's claim unavailing.

The authorities cited by the People are instructive. In *Davis*, in pretrial proceedings on a section 995 motion, the trial court dismissed a charge of attempted rape and assault to commit rape as to one of the victims, as well as a special circumstance of felony-murder rape. (*Davis, supra*, 10 Cal.4th at pp. 487-488.) "Prior to opening statements, the prosecutor informed defendant and the trial court that he would nonetheless seek to present evidence on first degree felony murder with the underlying felony of attempted rape. Defendant acknowledged, 'I have notice,' but objected on statutory and due process grounds. The trial court ruled that it would permit an instruction on felony-murder rape if the prosecution produced evidence in support of that theory." (*Id.* at p. 512.) After concluding the prosecution had done so, the trial court instructed the jury on felony murder based on rape or attempted rape. (*Id*. at p. 513.) On appeal, the defendant claimed this was error and a violation of his right to due process on the theory of inadequate notice. (*Ibid*.) Our Supreme Court rejected this claim. (*Ibid*.)[8]

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[8] Lack of notice does not appear to be a claim raised in defendant's opening brief. Defendant does not cite *Davis* and never asserts he lacked notice or explains how the presentation of his defense would have differed with more notice. Accordingly, we would reject such a claim. Our Supreme Court has "long held that a pleading charging murder adequately notifies a defendant of the possibility of conviction of first degree murder on a felony-murder theory." (*People v. Gallego* (1990) 52 Cal.3d 115, 188; accord *People v. Contreras* (2013) 58 Cal.4th 123, 149.) Even where the testimony at a preliminary hearing arguably does not alert the defendant to the need to defend against a

The defendant in *Davis* also argued that without a prior commitment order, the trial court lacked jurisdiction to hear the case on a theory of felony-murder rape. (*Davis, supra,* 10 Cal.4th at p. 514.) Our Supreme Court held that because there was a commitment order naming the charge of murder, jurisdiction had been established. (*Ibid*.) Quoting from *People v. Bernard* (1994) 27 Cal.App.4th 458, 470 (*Bernard*), disapproved on another ground in *People v. Box* (2000) 23 Cal.4th 1153, 1188, fn. 7, which we discuss next, the court explained that felony murder and premeditated murder are not distinct crimes, and it is not necessary to separately charge a defendant with felony-murder. (*Davis, supra,* at p. 514.) Additionally, "in ruling on the . . . section 995 motion, the trial court found sufficient evidence to support the murder charge; it made no *factual finding* concerning the *theories* that could support the charge, including the theory of felony-murder rape. It therefore retained jurisdiction to hear the murder charge on a theory of felony-murder rape." (*Ibid.*, first italics added.)

The defendant also argued that " 'something like collateral estoppel or res judicata' " should have precluded the use of a felony-murder rape as a theory of first degree murder after rape charges were dismissed. (*Davis, supra,* 10 Cal.4th at p. 514.) Our Supreme Court rejected these arguments as well. (*Ibid*.) The court explained in footnote 10 that none of the requirements for double jeopardy, res judicata, or collateral estoppel were satisfied. (*Id.* at pp. 514-515, fn. 10.) As relevant to this proceeding, it added, "Neither the magistrate at the preliminary hearing nor the judge at the pretrial

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theory of felony murder, reversal is not required where the presentation of the defendant's defense is not impaired. (See *People v. Murtishaw* (1981) 29 Cal.3d 733, 751, fn. 11, superseded by statute on other grounds as noted in *People v. Boyd* (1985) 38 Cal.3d 762, 773-774 ["[D]efendant, when apprised of the prosecution's felony-murder theory, did not request a continuance to prepare a defense against that theory; on appeal, defendant does not suggest any way in which the belated injection of the felony-murder theory into this case affected the defense. We conclude that the prosecution's failure to give defendant earlier notice of this theory did not impair the presentation of defendant's defense"].)

Penal Code section 995 hearing made any *factual findings* with respect to the dismissed counts of rape, attempted rape, or special-circumstance felony-murder rape. Indeed, as defendant concedes, the prosecution was free, among other options, to reinstate the dismissed charges [citation] or amend the complaint. Dismissal of the charges put defendant in the same position he would have been in if they had not been filed." (*Id.* at p. 514, fn. 10, italics added.) Defendant argues *Davis* is distinguishable because, here, the court made a "factual finding" that the prosecution's evidence failed to establish a temporal or causal connection between the robbery or burglary and the murder that would be necessary for felony-murder. The People, for their part, assert the trial court made no "factual findings" concerning the theories that could support the murder charge. The meaning of the phrase "factual finding" in *Davis* is unexplored by either party. Its use in footnote 10 suggests the term is used consistently with our Supreme Court's jurisprudence regarding when an information may charge an offense that was not named in the commitment order and was specifically rejected by the magistrate: "[W]here the magistrate makes *factual findings* which are fatal to the asserted conclusion that a particular offense was committed, the district attorney may not recharge that offense in the information. A clear example of this would be where the magistrate expresses disbelief of a witness whose testimony is essential to the establishment of some element of the corpus delicti. [¶] Where, however, the magistrate either expressly or impliedly accepts the evidence and simply reaches an ultimate legal conclusion therefrom—i.e., whether or not such evidence adds up to reasonable cause that the offense had been committed—such conclusion is open to challenge by inclusion in the information which action is thereafter subject to attack in the superior court under . . . section 995, and ultimately to appellate review." (*People v. Farley* (1971) 19 Cal.App.3d 215, 221, italics

added.) In ruling on the motion to dismiss under section 995, as in *Davis*, the superior court did not make any factual findings.[9] It did reach the legal conclusion that the evidence was insufficient to support the special circumstances allegation for a reason that could also apply to a felony-murder charge without explicitly stating this to be the case. That is not sufficient to distinguish *Davis*, or bar the prosecution from proceeding on a felony-murder theory.

In *Bernard*, the defendant argued on appeal that he was deprived of his constitutional right to notice of the charge against him when the trial court permitted the prosecution to present to the jury theories of felony-murder kidnapping and felony-murder kidnapping for robbery after the kidnapping special circumstances were dismissed on a section 995 motion prior to trial (a special circumstance of felony-murder robbery was not dismissed). (*Bernard*, *supra*, 27 Cal.App.4th at p. 469.) As we previously indicated, the appellate court explained it was not necessary to separately charge defendant with felony murder. (*Id.* at p. 470.) The court also stated that because the underlying felonies had been charged (as is true in this action), "[t]he amended information clearly put [the defendant] on notice the prosecution would press for felony murder." (*Ibid*.) The evidence and the defendant's theory of defense also put him on notice. (*Ibid*.) As defendant notes, the opinion provides no specifics regarding the basis on which the section 995 motion was granted. This silence, however, suggests the reasoning behind the ruling is of no relevance. What is important is that the section 995 motion was only directed at the special circumstances and the murder charge was adequate as pled and was never dismissed.

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[9] Nor are we suggesting that is the role of the superior court in ruling on a section 995 motion. (See *People v. Laiwa* (1983) 34 Cal.3d 711, 718, superseded by statute on another ground as stated in *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1223 ["in proceedings under section 995 it is the magistrate who is the finder of fact; the superior court has none of the foregoing powers"].)

Defendant's argument that the prosecution was precluded from revisiting the superior court's section 995 ruling is based largely on *People v. Saez* (2015) 237 Cal.App.4th 1177 (*Saez*) and the fact that a different judge permitted the prosecution to submit its felony-murder theory to the jury from the one that apparently would have rejected this theory. *Saez* is inapposite.

In *Saez, supra,* 237 Cal.App.4th 1177, as relevant to this appeal, the defendant unsuccessfully moved to dismiss from the original information an attempted murder charge but successfully moved to dismiss the accompanying allegation that the crime was deliberate and premeditated. (*Id*. at p. 1182.) Notwithstanding the court's oral ruling to this effect, the minute order incorrectly reported that the section 995 motion was denied. (*Saez, supra,* at p. 1182.) Over three years later, the People filed an amended information that included a premeditation allegation. (*Id*. at p. 1184.) At a subsequent hearing before a second judge, and with new counsel appearing for both sides, the court clerk represented that the section 995 motion had been denied and defense counsel did not contradict this representation. (*Saez, supra,* at p. 1184.) The jury found the defendant guilty of attempted murder and found true that the crime was deliberate and premeditated. (*Id*. at p. 1183.) The appellate court held the defendant's conviction for attempted premeditated murder could not be sustained because the premeditation allegation was dismissed and not properly realleged. (*Id*. at pp. 1183-1184.) The court explained that "[a] trial court 'generally has the authority to correct its own prejudgment errors.' [Citation.] 'Different policy considerations, however, are operative if the reconsideration is accomplished by a *different* judge[, and] . . . the general rule is just the opposite: the power of one judge to vacate an order made by another judge is limited.' [Citation.] 'For one superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge [improperly] places the second judge in the role of a one-judge appellate court,' and thus 'an order " ' " 'made in one department during the progress of a cause can neither be ignored nor

overlooked in another department . . . .' " ' " ' " (*Id*. at pp. 1184-1185.) The second judge lacked the ability to permit the information to be amended to allege premeditation. (*Id*. at p. 1185.) The first judge's ruling established that the defendant was committed without reasonable or probable cause supporting the premeditation allegation, and dismissed the allegation accordingly. (*Ibid*.) The People could have appealed the ruling or filed a new accusatory pleading that would have required a new preliminary hearing, but they did neither. (*Ibid*.) Thus, the error was prejudicial because "it resurrected an allegation whose dismissal the prosecution never properly challenged and that never should have been tried." (*Id*. at p. 1187.) Defendant argues that, here, the prosecution was bound by the superior court's section 995 ruling because it neither appealed the ruling, nor dismissed the charges and filed a new accusatory pleading. But this argument fails, and *Saez* is distinguishable, because the information never pled—nor was it required to plead—the felony-murder theory, and the court never dismissed the felony-murder theory. There was nothing to appeal or amend. (Compare *People v. Williams* (2005) 35 Cal.4th 817, 830 [magistrate's order after preliminary hearing determining that wobbler offenses were misdemeanors was not appealable because it did not set aside any portion of the complaint], with *People v. McKee* (1968) 267 Cal.App.2d 509, 513 [order directing district attorney to file an amended information charging defendant with voluntary manslaughter was appealable because it was tantamount to a dismissal of murder charge].)

Defendant also relies on *People v. Graff* (2009) 170 Cal.App.4th 345 (*Graff*). It too is inapplicable. In *Graff*, the court of appeal reversed the defendant's convictions on two counts of committing a lewd or lascivious act on a child of 14 or 15 years in violation of section 288, subdivision (c), "because the jury was permitted to convict based on charges not established at the preliminary hearing." (*Graff, supra,* at p. 349.) The defendant was initially charged with six such counts as to Victim 1. (*Ibid.*) At the preliminary hearing, the victim testified to five incidents, two of which involved

defendant watching her masturbate. (*Id*. at p. 350.) Because the victim was not certain whether the masturbation incidents occurred before or after she turned 16 years old, the magistrate dismissed the two counts that were based on these incidents and matched the remaining counts with a specific incident from Victim 1's testimony. (*Id*. at p. 351 & fn. 7.) After the hearing, an information was filed conforming to the commissioner's rulings and charging the defendant with three counts of violating section 288, subdivision (c) as to Victim 1. (*Graff, supra,* at p. 351.)

At trial, Victim 1 was allowed to testify concerning the masturbation incidents as indicative of motive or intent under Evidence Code section 1101. (*Graff, supra*, 170 Cal.App.4th at pp. 352-353 & fn. 10.) This time, she testified she was 15 years old when the first incident occurred, but was unsure when the second incident occurred. (*Id*. at p. 354.) During closing argument, defense counsel stated there were "[n]o charge[s] concerning the masturbation episodes." (*Id*. at p. 357.) In rebuttal, the prosecutor disagreed and argued the defendant could be convicted of "*any lewd act that he committed with* [*Victim 1*] *while she was 14 or 15 years old*," including the masturbation incidents. (*Id*. at p. 358.) The jury convicted the defendant of two counts of violation of section 288, subdivision (c) as to Victim 1. (*Graff, supra,* at p. 360.)

The court of appeal reversed, holding the defendant's "due process rights to notice of the charges against him were violated by the prosecution's decision to go forward with charges not established at the preliminary hearing." (*Graff, supra*, 170 Cal.App.4th at p. 360.) The court began its analysis by explaining the prosecution did not and could not have filed an information containing the charges not found true by the commissioner because a charge may be asserted or reasserted only when the magistrate incorrectly concluded the evidence presented at the preliminary hearing was insufficient. (*Id*. at pp. 360-361; see § 739 [information "may charge the defendant with either the offense or offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate to have been committed"].) A review of the

evidence presented at the preliminary hearing established the commissioner's ruling was correct. (*Graff, supra,* at p. 361.) "The commissioner . . . made specific findings concerning which incidents were supported by an adequate factual basis and which were not, and dismissed the latter. As there was no valid basis to challenge the commissioner's ruling and no attempt was made to refile the charges, the prosecution's sole option was to go forward on the remaining charges. Instead, the prosecutor chose to ignore the commissioner's ruling, misinform the jury, and secure convictions on charges not properly before the court." (*Id*. at p. 367.) *Graff* is inapplicable because here the prosecution did not need to amend the information to proceed on a theory of felony murder, nor did it need to challenge the superior court's ruling to do so.

Defendant's assertion that the superior court's ruling on his section 995 motion barred the jury from convicting him of first degree murder on a felony-murder theory is without merit. Accordingly, his trial counsel was not ineffective in failing to object. The failure to raise a meritless objection does not constitute ineffective assistance of counsel. (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90.)

*B. Felony-Murder Burglary*

Defendant asserts his convictions were based on insufficient evidence and legally insufficient theories. He does not, however, argue there was insufficient evidence to convict him of first degree murder based on premeditation and deliberation. Rather, his arguments pertain to the burglary charge and its potential use for felony murder.

The court instructed the jury that "[t]o prove defendant is guilty of felony murder, the People must prove": (1) "the defendant committed or attempted to commit robbery or burglary;" (2) "the defendant intended to commit robbery or burglary;" and (3) "while committing or attempting to commit robbery or burglary, the defendant caused the death of another person." Further, "[t]he defendant must have intended to commit the felonies of robbery or burglary before or at the time that he caused the death. It is not required that the person die immediately, as long as the act causing death occurred while the

defendant was committing the felonies." The court referred the jury to separate instructions on robbery and burglary to determine whether the defendant committed or attempted these felonies. There, the court instructed the jury that to prove burglary, the prosecution must show: (1) "the defendant entered a building" and (2) "when he entered a building, he intended to commit theft or murder." The prosecution's closing argument suggested three different theories of entry to support burglary findings and thus felony-murder burglary. Specifically, the prosecution argued "one of the ways was simply entering the victim's home through the front door to take the television, to take the items that the defendant took. [¶] Another way is when the defendant dragged the victim's body into the garage . . . with the intent to commit murder, because leaving the victim's body in the garage without seeking any medical attention would definitely result in the victim's murder, did result in the victim's murder. [¶] So, clearly, that's what the defendant intended when he entered the garage, and I would also submit that when the defendant threw the rock through the window with the intent to commit both theft and murder, that that was an entry . . . ." We address these theories in order.

*1. Entry with Intent to Steal*

Defendant contends there was insufficient evidence he entered the house with the intent to steal, or that he committed robbery or burglary contemporaneous with Artis's death, because possession of stolen property is insufficient to support "a murder charge based on felony murder." This argument undersells the evidence against him.

"[P]ossession of recently stolen property by itself is not sufficient to support a finding of guilt of *any* offense—including theft-related offenses—and, accordingly, there must be other corroborating evidence of the defendant's guilt." (*People v. Moore* (2011) 51 Cal.4th 1104, 1130.) For theft-related offenses, the corroboration need only be slight. (*Id.* at pp. 1130-1131.) But even with respect to other offenses, "the corroborating evidence need not be sufficient to prove guilt by itself." (*Id.* at p. 1131.) " 'When considering a challenge to the sufficiency of the evidence to support a conviction, we

review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.)

Here, defendant's DNA was on a rock thrown through Artis's window and defendant was overheard expressing his intent to return to steal from Artis shortly after he initially punched him. The fact Artis never reported the computer, wallet, or television missing indicates that he died before or around the same time as defendant's taking of them. While enough time lapsed before Artis's body was discovered that it was possible for defendant to have returned separately to commit the burglary, the fact defendant dragged Artis's body into the garage and out of view after killing him makes it reasonable to infer he did not risk a later return to the scene of the crime in order to take these items. There was sufficient evidence from which a jury could reasonably infer defendant returned to Artis's house angry and with the intent to steal, and beat him to death as part of the same transaction in which he stole from him. Thus, substantial evidence supported both defendant's conviction for burglary and a theory of felony murder based on that burglary.

*2. Entry into Garage*

Defendant argues the prosecution's theory that dragging Artis into the garage constituted burglary based on intent to murder is factually and legally insufficient.[10]

During deliberations, the jury asked whether "the defendant has to commit Burglary/Robbery first, then a death occurs" for the requirements for felony murder to be met. The court referred the jury back to the instructions regarding felony murder, "specifically, element 3," which had instructed the jury that felony murder requires that "while committing or attempting to commit robbery or burglary, the defendant caused the death of another person." The court further instructed that, "If a defendant causes the death of another person, and after causing the death commits or attempts to commit robbery or burglary, it is not Felony Murder. The defendant must have intended to commit the felonies of robbery or burglary before or at the time that he caused the death. It is not required that the person die immediately, so long as the act causing death occurred while the defendant was committing the felonies."

Consistent with these instructions, defendant argues dragging the victim into the garage was not an act causing death nor was there any evidence that any act in the garage caused death or that he intended to do any act in the garage that would cause death. Defendant further contends there was no evidence regarding whether Artis was dead or alive when he was moved into the garage, that the drag marks made it reasonable to infer he was completely incapacitated or deceased, and if he was already deceased, the entry into the garage could not support burglary with intent to murder. We will add that Artis's body positioning supports the inference defendant dragged a dead body into the garage.

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**10** The People attempt to concede it was legally insufficient because, under the merger doctrine, felony-murder burglary cannot be based on entry with intent to kill. We do not accept this concession because this is no longer the law. (*People v. Covarrubias, supra,* 1 Cal.5th at pp. 881-882.)

Significantly, the jury was instructed that these facts would not support a conviction for burglary or felony-murder. And defendant does not claim the instructions were erroneous or misled the jury in any way. As we have set forth above, the evidence did support a conviction for burglary and felony murder under other theories. The invalid theory defendant cites appears in the prosecutor's closing remarks. Any claim regarding this theory is forfeited because defendant did not object to the prosecutor's argument in the trial court. (*People v. Morales* (2001) 25 Cal.4th 34, 43-44.)

*3. Entry with Rock*

Defendant argues the theory he threw a rock into Artis's window with intent to steal or murder was legally and factually insufficient because there was no evidence he threw the rock through the window with intent to commit any felony inside the house. This claim is unavailing because a defendant commits a burglary with an entry into a house with the intent to commit a felony. (§ 459.) There is no requirement the felony be committed therein. (*People v. Griffin* (2001) 90 Cal.App.4th 741, 748; *People v. Wright* (1962) 206 Cal.App.2d 184, 188.) Again, defendant does not assert the instructions were erroneous or misled the jury in any way. Any claim that this theory was invalid is forfeited, because he did not object to the prosecutor's argument in the trial court. (*People v. Morales, supra,* 25 Cal.4th at pp. 43-44.)

*C. Refusal to Instruct on Lesser Included Offense of Voluntary Manslaughter*

*1. Trial Court Proceedings*

Defendant's trial counsel requested that the court instruct the jury on voluntary manslaughter and self-defense. The court found there was no substantial evidence in the record to support either instruction. The court explained the prosecution was referencing events that took place on October 8, and defendant was not charged with anything related to what happened on that date.

*2. Insufficient Evidence*

Defendant contends his murder conviction must be reversed because the trial court failed to instruct on the lesser included offense of voluntary manslaughter. We disagree.

A trial court has a sua sponte duty "to instruct fully on all lesser necessarily included offenses supported by the evidence. . . . [I]n a murder prosecution, this includes the obligation to instruct on every supportable theory of the lesser included offense of voluntary manslaughter . . . ." (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149.) "[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obligated to instruct on theories that have no such evidentiary support." (*Id*. at p. 162.) "In a murder case, . . . both heat of passion and unreasonable self-defense, as forms of voluntary manslaughter, must be presented to the jury if both have substantial evidentiary support." (*Id*. at p. 160.) " 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]" ' that the lesser offense, but not the greater, was committed." (*Id.* at p. 162.)

Defendant argues there was sufficient evidence to instruct the jury on a heat of passion theory of voluntary manslaughter. "A heat of passion theory of manslaughter has both an objective and a subjective component." (*People v. Moye* (2009) 47 Cal.4th 537, 549.) To satisfy the objective element, "the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Id*. at p. 550.) "To satisfy the subjective element . . . , the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation." (*Ibid*.) "If sufficient time has elapsed for one's passions to 'cool off' and for judgment to be restored," the killing is not voluntary manslaughter. (*People v. Beltran* (2013) 56 Cal.4th 935, 951.) "Adequate provocation and heat of passion must be affirmatively demonstrated." (*People v. Lee* (1999) 20 Cal.4th 47, 60.)

Defendant contends circumstantial evidence permits the inference he was provoked by Artis, and that he acted under a heat of passion at the time of the killing. The problem with his claim is that while Artis may have been angry with defendant, there is no evidence about any provocation he offered after October 8, at least two days before his death. As a matter of law, two days is sufficient time for defendant's passions to have cooled. (See *People v. Hach* (2009) 176 Cal.App.4th 1450, 1458-1459; *People v. Shade* (1986) 185 Cal.App.3d 711, 715.) That Artis's injuries are suggestive of an attack based on anger is not sufficient to justify an instruction on voluntary manslaughter because they are consistent with either a provoked or a premeditated killing. (See *People v. Pride* (1992) 3 Cal.4th 195, 250 ["[B]ecause the injuries inflicted upon the victims were consistent with either a provoked or a premeditated killing, we reject defendant's claim that such evidence in and of itself justified the requested instructions"].) Nor is the fact that Artis had methamphetamine in his system at the time of his murder sufficient to justify the instruction. It would still be speculation to infer that defendant's anger was provoked by Artis or that defendant acted under a heat of passion at the time of the killing. The trial court had no duty to give a voluntary manslaughter instruction.

*D. Physical Restraints*

*1. Trial Court Proceedings*

The court held a pretrial hearing to address the use of restraints. A deputy with the Shasta County Marshal's Office had requested the court order the use of belly chains and leg irons throughout the trial. Belly chains go around the waist with a handcuff near each hip, and prevent any reaching or movement of the arms any distance away from the body. Leg irons go around the ankles and restrict step length so that it is difficult to run or kick. The deputy testified the reason for his request was that "based on my review of [defendant's] jail records, the jail write-ups that he has, . . . and his conduct while he's been in custody, and my dealings with him when I was assigned to Department 2, I believe there's a very good chance of some sort of violence in the courtroom if he's

unrestrained." The deputy stated his belief that defendant would pose a credible threat of violence in the courtroom and potentially disrupt the proceedings unless he was restrained.

The deputy testified as to several incidents based on defendant's jail records:

In the first incident, a correctional officer found defendant on top of another inmate while engaged in a physical altercation. Defendant was ordered to stop fighting and get down on the floor several times, but he refused. "[T]he altercation became such that . . . the use of a Taser by the [correctional officer] was used and [defendant] continued to fight, even after being Tased." The officer struck defendant two or three times with a baton before defendant finally complied with orders.

In the second incident, defendant refused several times to comply with an order to remove his headband. "[I]t escalated to the point where the correctional officer attempted to place [defendant] in handcuffs, and [defendant] attempted to pull away and continued to struggle with the correctional officer that was attempting to handcuff him until more correctional officers arrived to help restrain [defendant]."

The third incident occurred the following day, and began with defendant laughing and refusing to comply with orders to step back from his door. After he finally did so, he struck one of the correctional officers on the cheek with a closed fist. Defendant was loudly and clearly ordered to stop resisting several times. It took four or five correctional officers to gain control of him.

The fourth incident began after defendant was involved in a fight in his housing unit. As defendant was being escorted out of the unit in handcuffs, he lunged at a correctional officer, yelled "Fuck you," and spit blood on the officer's face and neck.

The deputy was familiar with defendant from being previously assigned to Department 2. Defendant was not violent in the holding cells in Department 2, but he would regularly refuse to follow verbal orders until he was ordered several times to do so.

The deputy testified that belly chains and leg irons were not the least visible form of restraint available, but less visible restraints would not be sufficient because they would allow defendant to use his arms and/or legs and therefore increase the potential for violence in the courtroom. The lesser forms of restraints were a leg brace and a device called a "Bandit" that could deliver a shock to the leg. The leg brace only restrains one leg. The deputy testified that the Bandit falls off regularly, and the court noted defendant had previously continued to fight after being Tased.

The deputy agreed that at times he had difficulty communicating with defendant because of a language barrier.

The court discussed measures to obscure the restraints from the jury. Defense counsel argued it was imperative that defendant be able to write her notes at counsel table. The court responded, "if I decide that these restraints are . . . the necessary level of restraint, I'll give you every opportunity to communicate verbally with him. [¶] He can also nod his head in the affirmative or in the negative, but you'll have an opportunity to communicate verbally through an interpreter."

Defense counsel also argued the restraints would prejudice the jury against her client, and that it would appear disrespectful for him to remain seated as the jury entered the courtroom.

The court explained it had reviewed relevant legal authority, and ultimately found "there is a manifest need for the defendant to be restrained in the courtroom in this case. [¶] . . . [T]he Court is looking at the public safety and the order in the court room, . . . and I'm considering the conduct of the defendant . . . . [¶] . . . I am convinced that the belly chains and the leg irons are the least restrictive form of restraint that addresses the risk posed by the defendant" based on the prior incidents. The court expressed concern regarding the visibility of the restraints, and then addressed how to ensure they were concealed. Defendant was wearing belly chains and leg irons during the hearing, and the court observed that it could not see the restraints and defendant appeared to be sitting

comfortably. The court later revisited its ruling at the prompting of defendant's counsel, each time reaffirming its original decision.

*2. Manifest Need*

Defendant contends the trial court violated his rights to due process and a fair trial when it ordered him to wear restraints during trial. We disagree.

Under California law, "a criminal defendant may be subjected to physical restraints in the jury's presence upon 'a showing of a manifest need for such restraints.' " (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1031.) Similarly, the federal "Constitution forbids the use of visible shackles . . . *unless* that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." (*Deck v. Missouri* (2005) 544 U.S. 622, 624.) In deciding whether restraints are justified, the trial court may "take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial." (*Id*. at p. 629.) "These factors include evidence establishing that a defendant poses a safety risk, a flight risk, or is likely to disrupt the proceedings or otherwise engage in nonconforming behavior." (*People v. Gamache* (2010) 48 Cal.4th 347, 367.) "If the record establishes restraints are necessary, a trial court should select the least obtrusive method that will be effective under the circumstances." (*Ibid*.) Although the trial court's decision to restrain a defendant must be based on more than rumor or innuendo, a formal evidentiary hearing is not required. (*People v. Lewis and Oliver, supra,* at p. 1032.) "A shackling decision will be upheld absent a manifest abuse of discretion." (*Ibid*.) On appeal, "we consider whether the trial court made the findings necessary to impose a particular security measure—that there was a manifest need, and that the measure chosen was the least obtrusive that would still be effective—and further whether those findings were supported by substantial evidence." (*People v. Gamache, supra,* at p. 368.)

Defendant's argument is based on Ninth Circuit case law "that a defendant be shackled during trial only after the trial court is 'persuaded by compelling circumstances

that some measure is needed to maintain security of the courtroom' and if the trial court pursues 'less restrictive alternatives before imposing physical restraints.' " (*U.S. v. Cazares* (9th Cir. 2015) 788 F.3d 956, 965.) Under the federal standard defendant seeks to apply, "[i]n deciding whether less restrictive alternatives to shackling exist, a trial court must begin by assessing the disadvantages and limitations if shackles are applied to a defendant. [Citation.] Such disadvantages and limitations include (1) reversal of the presumption of innocence, (2) impairment of the defendant's mental ability, (3) impeding of communication between the defendant and his counsel, (4) detraction from the decorum of the trial, and (5) pain. [Citation.] 'After considering these factors, the trial judge "must weigh the benefits and [these] burdens of shackling against other possible alternatives." ' " (*Ibid*.)

Defendant contends the trial court only considered public safety in determining whether there was a manifest need, and failed to take into account any of the factors that federal courts consider in determining whether less restrictive alternatives exist. Here, the record suggests the trial court considered these issues as they pertained to defendant's situation before determining no less restrictive alternative would suffice. Even if we analyze defendant's claims under federal law, specific findings on the record regarding these factors are not required. (*U.S. v. Cazares, supra,* 788 F.3d at p. 965.) Of primary importance to our analysis, and consistent with the requirements of California law, substantial evidence supports the trial court's finding of manifest need. (*People v. Lewis and Oliver, supra,* 39 Cal.4th at p. 1031 ["This requirement is satisfied by evidence that the defendant has threatened jail deputies, possessed weapons in custody, threatened or assaulted other inmates, and/or engaged in violent outbursts in court"].) Defendant argues that, in determining there was no less restrictive alternative, the trial court failed to consider the necessity for defendant to have a free arm to take notes and adjust his hearing device. But the record demonstrates the trial court concluded that permitting

defendant to have a free arm would not be effective based on his prior conduct. Defendant has not demonstrated an abuse of discretion.

*E. Receipts*

*1. Trial Court Proceedings*

During trial, the investigative technician who processed Artis's SUV testified regarding various items she found inside the vehicle. Exhibit 187 contained two items, including a receipt for Old Station Fillup she found in a backpack on the rear driver's side of the SUV. Defense counsel objected on the basis of hearsay. The court admitted the evidence.

The technician also testified about Exhibits 188 and 189, which were MoneyGram receipts that she also found in the backpack. Defense counsel stated no objection to the admission of either of these exhibits, and the court admitted them.

Later, outside the jury's presence, the court asked for an objection regarding the receipts to be stated on the record.

Defense counsel stated, "regarding the receipts, we were wanting to lodge our objection for the record, . . . that we believe under Evidence Code [section] 250 that any type of writing, including a receipt, is a writing, and that while . . . there are definitely numerous exceptions to the hearsay code, such as authentication, that we were objecting that the receipt had not been . . . authenticated and a proper foundation had not been laid for the receipts."

The court said a receipt is not hearsay because it is generated by a machine. Defense counsel argued a statement does not need to be made by a person to be hearsay. The prosecutor agreed with the court's statement of the law and also argued that, because the receipt was obtained in the search of a vehicle, authentication was not required.

Defense counsel responded, in part, "it is coming in for the truth. The implication is that it was found in this car; therefore, [defendant] was there at the gas station on the 10th at that time. I believe that that is the implication, and that there wasn't any type of

proper foundation or authentication for it, and we'd like to federalize our objections as well.

"THE COURT: When you say it's coming in for the truth, I just want to be clear. It's not coming in for the truth of the fact that [defendant] was at a gas station. It's coming in as a receipt, which has a date and a time stamp on it and the other information on it. [¶] So, I'll be clear with the prosecution. The Prosecution isn't offering it for the truth that [defendant] was at the gas station . . . and that that was a receipt by virtue of him getting gas and paying for it. You're offering this as an item of circumstantial evidence, but not for the truth of the matter. Because it's a typewritten wording generated by a machine, it doesn't fall within the hearsay rules. [¶] . . . [¶] . . . [A]lso, this references Exhibits 187, 188 and 189 as well, and I can't remember on the record as to whether there were objections to all three at the time they were offered, but the record will speak for itself in that regard."

*2. MoneyGram Receipts*

Defendant has forfeited his objection to admission of the MoneyGram receipts because he did not make a timely objection to their admission. (*People v. Boyette* (2002) 29 Cal.4th 381, 423-424.)

*3. Old Station Fillup Receipt*

The Old Station Fillup receipt shows a $30 cash sale of gasoline on October 10, 2014, at 3:26 p.m. The receipt also includes an address for the station. We need not decide whether the trial court erred in admitting this receipt because we conclude any error was harmless.

We cannot reverse defendant's conviction unless "it is reasonably probable that a result more favorable to [him] would have been reached in the absence of the error." (*People v. Watson, supra,* 46 Cal.2d at p. 836; see *People v. Duarte* (2000) 24 Cal.4th 603, 619 [*Watson* standard is applicable to state law error in admission of hearsay];

*People v. Crabtree, supra,* 169 Cal.App.4th at p. 1313 [applying *Watson* standard to erroneous admission of hearsay sales receipt].)

Defendant argues it is reasonably probable he would have received a more favorable result at trial if the receipt had been excluded. We disagree. The prosecution referenced the receipt in closing argument as part of its review of defendant's whereabouts between October 8, 2014, and the time Artis's body was discovered: "Now, the defendant says that he went back two days after he left, and in the interview—and I'll get to it . . . a little bit later, but with the calendar he also describes . . . going back and looking for the home he describes on the 11th. [¶] Two days after would be on the 10th, but this gas station receipt is located in the vehicle, the SUV, and it indicates that $30.00 was purchased for gas on October 10th, and the defendant indicates that at some point he must have purchased this gas when he was on his way back to the marijuana garden. [¶] Now, we know between October 8th and October 12th, and more than likely on October 10th, that the defendant went back to the victim's property." Defendant argues the receipt was critical to the prosecution's theory that he killed Artis on October 10, 2014, because no other evidence created the inference he had the opportunity to kill Artis on that date. This argument overstates the value and use of the receipt. As the prosecutor described in closing argument, defendant admitted in his post-arrest interview much of the information in the receipt—that he went back on October 10 and bought $30 of gas with cash at around 3:00. In his reply brief, defendant places great significance on the fact his statements during the interview differed from the receipt because he appeared to agree the time was in the morning. Artis was still alive on the morning of October 10. Interestingly, the prosecution seemed to believe Artis was still alive at 3:00 p.m. as well. The prosecution argued the crime likely happened on the night of October 10 or into the early hours of October 11, but explained to the jury that it was only required to prove the crime took place reasonably close to October 11. More importantly, there was other, more compelling, evidence that defendant was at Artis's house at the actual time of the

murder. Defendant's DNA was found on the rock that was thrown through Artis's window. The evidence also demonstrated defendant took Artis's wallet, computer, and television after he was last seen. Thus, we conclude any error in admitting the receipt was harmless.

## III. DISPOSITION

The judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

HULL, Acting P. J.

/S/

ROBIE, J.